1969

Kirk B. Bowman v. Janice S. Bowman : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

KIRK B. BOWMAN,
Plaintiff-Appellant,

vs.

JANICE S. BOWMAN,
Defendant-Respondent.

Case No. 11534

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County, State of Utah
HONORABLE JOSEPH G. JEPPSON, Judge

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NATURE OF CASE

This is a divorce action.

DISPOSITION IN LOWER COURT

By the decree of divorce entered January 29, 1969, (R. 52-56) plaintiff's complaint, he being the appellant herein, was dismissed and defendant, the respondent, was granted the divorce pursuant to her counterclaim. Defendant was awarded the custody of the minor children, Charles and David, subject to reasonable rights of visitation in favor of the plaintiff, with the proviso that the custody of Charles was of a temporary nature pending a report from the Conciliation Department of the District Court. The daughter, Mary Elizabeth, born January 14, 1951, died on or about January 18, 1969, after the trial of the cause and before the entry of the decree (R. 45).

The plaintiff was ordered to pay alimony in the amount of $350.00 per month and child support of $100.00 per month per child until the further order of the court. Attorneys' fees in the amount of $118.75 were ordered paid to defendant's previous attorney and $600.00 for the benefit of her present attorneys. The plaintiff was ordered and required to pay court costs of $66.34 (R. 56).

The court computed the marital estate to be the value of $348,254.90, of which there was allocated to the defendant approximately one-third (R. 42). This adjustment was made by the memorandum decision of the court dated January 17, 1969, modifying the earlier memorandum decision filed and dated January 15, 1969 (R. 38-41). Of the marital estate and after deducting the value of specific items awarded to the defendant, there was an award of $69,166.73 earmarked as being one-third of the value of plaintiff's interest in his various business corporations, which sum was subject to interest from the date of the decree, the court reserving jurisdiction to determine the amounts from time to time payable from the monetary interest so awarded (R. 54).

RELIEF SOUGHT ON APPEAL

Appellant, on conflicting evidence, would have this court substitute its judgment for that of the trial court on the property award and render a decree accordingly.

STATEMENT OF FACTS

In an effort to be of assistance to the court in the burden imposed upon it, we feel it necessary to elaborate

upon appellant's statement. The trial took three days and the record on appeal is voluminous.

The parties were married at Newman Grove, Nebraska, on the 14th day of August, 1949, and three children were born as issue of the marriage. Mary Elizabeth became 18 the day after the trial and died within five days thereafter. Charles Benjamin was 16 and David was 8. Charles, who was residing with his mother, was under sentence by the Juvenile Court of Salt Lake County for an indeterminate time in the State Industrial School at Ogden. There were certain alternatives, one of which involved enrollment in a private school or treatment center at a private institution in Texas at a charge of $1,000.00 per month (R. 88-90).

At the time of the marriage, the plaintiff was attending the University of Nebraska working towards a bachelor's degree in engineering and the defendant was teaching with her earnings going into a bank account that provided support for the family. Defendant's teaching commitment lasted for one school year after the marriage in August of 1949. Plaintiff received his bachelor's degree in January of the year following the marriage and he was uncertain as to whether defendant quit her work at the end of the following school year because of pregnancy or because of his being able to provide for the family (R. 116-117). Gifts from defendant's family totaling $5,500.00 went toward the accumulations of the parties including the down payment on the home (R. 235).

At the present time defendant is attending the University of Utah in an effort to get a certification as a teacher (R. 258-259).

Plaintiff is a contractor involving highways, dams and canal construction largely in connection with interstate highway work and at the time of trial counsel stipulated that there was upwards of $50,000,000.00 of freeway construction concerning which plaintiff would be interested as a subcontractor (R. 117-122). Plaintiff is the general manager of Intermountain Industrial Pipelines, Inc., which is either the parent company or an interlocking concern with four other companies. The parent company is a Nebraska corporation (R. 123). His company does business in California, Arizona, Nevada, Utah, Idaho, Wyoming and Colorado.

Plaintiff receives a salary of $350.00 a week and a bonus of $7,000.00 a year (R. 137-138). Plaintiff estimated the gross annual earnings of his company on a fiscal year basis ending January 31 of $750,000.00 (R. 131). Plaintiff testified that it was costing him about $4,000.00 a day to run *his* business and when queried about the connotation of the alter ego, explained that he was the president of the company and 89% owner (R. 191, 197).

When questioned about Exhibit P-2, his personal financial statement given to United States Fidelity & Guaranty Company, plaintiff stated that while the statement was as of January 31, 1968, and prepared by him and signed on April 30th of that year, there was no

substantial difference as between the close of the fiscal year, the previous January, and the date of the statement, April 30, 1968, which was approximately one month prior to the filing of his complaint in the instant action (R. 198). The financial statement was given in order for the plaintiff to secure a bond (R. 196) and it took into consideration the obligation to Kenneth J. Sughroue in the amount of $60,000.00 in connection with the purchase from him of 888-⅔rds shares of stock (R. 125-126). Exhibit P-2 accounts for other assets claimed by the plaintiff, which assets, including tax refunds, bank accounts, public stocks, savings accounts, furniture and other items, and the so-called inheritances, are elaborated upon in his testimony (R. 99-110).

The home, valued by the plaintiff at $28,500.00 (Exhibit P-1), is subject to a mortgage in the amount of $18,011.13 (R. 275) payable at $167.42 per month (Exhibit D-4) and was allocated to the defendant subject to the indebtednesses thereon, which, by the decree, she was required to assume and pay (R. 54). Plaintiff carried better than $78,000 of insurance on his life (R. 226) of which $30,000 was ordered to be maintained for the benefit of the defendant (R. 55). Since the filing of the complaint, plaintiff was paying to the defendant, on a voluntary basis, the sum of $268.00 every two weeks (R. 118).

Plaintiff left the home of the parties in October, 1967, and expressed the opinion that the marriage could not be retrieved (R. 136-137). In outlining the grounds

for divorce, his attention was called to his deposition wherein he stated in effect that his wife was unable to properly raise the children causing them considerable amount of personal problems and causing the plaintiff great mental anguish (R. 110). His testimony given at the time of his deposition differed materially from his testimony at the time of trial and particularly with reference to the expressing of "making out" with another man (R. 110-115). Any misconduct on the part of the defendant was denied by her (R. 143-148). There were times that the daughter expressed hostility toward the defendant (R. 166-167).

On the other side of the coin, the defendant testified that her husband packed his bags, left the home and stated that he was not coming back. This was after there had been trouble both with Charles and Mary. He left the children with the defendant, stating that he was sorry that they had to stay with her when he was going (R. 212-213). The plaintiff told the defendant that he had never had any affection for her and wanted her to get a divorce (R. 216-217). The defendant sought marriage counseling and stated to the court that the plaintiff was a good father, that she had an affection for him, that she was a good mother and had tried to make the marriage work but had constantly been rebuffed by the plaintiff (R. 219-221). There was ample justification for the court to find against the plaintiff on his complaint and for the defendant on her counterclaim and in finding that the fault is with the plaintiff and not with the defendant (R. 45-46).

ARGUMENT

POINT I

THERE WAS NO ABUSE OF DISCRETION.

In *Stone v. Stone*, 19 Utah 2d 378,380, 431 P.2d 802 (1967), this court stated:

> "In reviewing the trial court's order in divorce proceedings there are certain well established principles to be borne in mind. The findings and order are endowed with a presumption of validity, and the burden is upon the appellant to show they are in error. Even though our constitutional provision, Section 9 of Article VIII, states that in equity cases this court may review the facts, we nevertheless take into account the advantaged position of the trial judge. Accordingly, we recognize that it is his prerogative to judge the credibility of the witnesses, and in case of conflict, we assume that the trial court believed the evidence which supports the findings. We review the whole evidence in the light most favorable to them; and we will not disturb them merely because this court might have viewed the matter differently, but only if the evidence clearly preponderates against the findings.
>
> For similar reasons, the trial court is allowed a comparatively wide latitude of discretion in determining what order should be made in such matters; and we will not upset his judgment and substitute our own unless it clearly appears that the trial court abused its discretion, or misapplied the law."

Appellant's brief falls far short of sustaining the burden imposed upon him to overcome the presumption

of validity of the findings and decree as pointed out above. The net worth placed upon the holding of the plaintiff coincide with his personal statement given to United States Fidelity & Guaranty Company (Exhibit D-2). He made no attempt, and there is nothing in the record to dilute the figures indicating the net worth value of $296,693.00. The financial statement is dated April 30, 1968, practically a month before he filed his complaint seeking the divorce and reflects his financial condition after his purchase of stock from his former business associate (R. 124-128). While the financial statement purports to speak as of the close of the fiscal year, January 31, 1968, plaintiff testified that there was no substantial change in his financial condition as of the date of April 30, 1968 (R. 198-199).

In awarding the defendant approximately one-third of the plaintiff's net worth from the business, the court nevertheless took into consideration plaintiff's business obligations and the cash flow therefrom in providing that as to such interest that jurisdiction be reserved to determine the amounts from time to time payable to the defendant from the monetary interest so awarded (R. 54).

Appellant points to no portion of the record nor is he objective in any sense of the word in his generalized indictment of the trial court. Appellant paints with a broad brush the generalization of abuse of discretion which is not justified in light of the record that discloses a patient and careful consideration by the trial court

of every facet of a tragic and unfortunate marital problem.

POINT II

THE FINDINGS OF THE TRIAL COURT ARE BASED ON CONFLICTING EVIDENCE.

In *Alldredge v. Alldredge,* 119 Utah 504, 229 P.2d 681, 682 (1951), this court stated:

> "In her appeal, the first contention of the defendant is that there is no evidence in the record upon which the court could find defendant guilty of mental cruelty. As this case is an equity case, this court has the duty and the power to determine the facts for itself. However, as was held in *Doe v. Doe,* 48 Utah 200, 158 P. 781, 786, and *Schuster v. Schuster,* 88 Utah 247, 53 P.2d 428, we will not upset findings of the trial court on issues in which the testimony was in conflict, unless the record shows that such findings are clearly against the weight of the evidence. See also *Stanley v. Stanley,* 97 Utah 520, 94 P.2d 465; this because the trial court has a better opportunity to judge the credibility of the witnesses and the weight of their testimony. Especially is this true in cases involving quarrels between spouses."

The plaintiff contradicted his own net worth by attempting to persuade the court to adopt his Exhibit P-1. Through the exhibit he gave no value whatsoever to his corporate holdings. His evidence in that respect was directly impeached by his personal statement (Exhibit D-2) given for the purpose of securing a bond from the United States Fidelity & Guaranty Company. As pointed out above, he was less than forthright in his

stated grounds for divorce as disclosed in the deposition taken before trial. There was ample evidence to sustain the findings in favor of the defendant and to impugn the integrity of the plaintiff. In three days of trial time it is fair to assume that the trial court became well acquainted with the problems and with those variables that give to it the direct opportunity to judge the credibility of the witnesses and the weight of their testimony.

CONCLUSION

The judgment of the trial court should be sustained and the defendant should be awarded such relief by way of costs and attorneys' fees incident to the defense of this appeal as the court deems just.

Respectfully submitted,

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for

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